THE ORIGIN OF THE PECULIAR DUTIES OF PUBLIC SERVICE COMPANIES.

PART I.

We are frequently and increasingly confronted in our perusal of legal literature with the term "public service company." Courts use it; the compilers of legal reports, encyclopedias and digests are adopting it as a recognized term useful for legal classification; at least one collection of cases has been published containing only cases which it is conceived by the editor may properly be classed as dealing with public service companies;[1] a good deal of discussion of the duties and liabilities of public service companies will be found in books on carriers, innkeepers, electricity, irrigation, eminent domain, taxation and other branches of the law, and a text book has just appeared[2] which deals exclusively with this subject, but still surprisingly little effort has been made to determine how the law of public service companies arose, what public service companies are, and why they are subjected to peculiar rules of law. It will be the object of this article to consider these questions.

Professor Bruce Wyman first dealt at length with the present subject in an interesting and valuable article entitled "The Law of the Public Callings as a Solution of the Trust Problem,"[3] and the substance of that part of the article pertinent to this discussion has been incorporated into the work on "Railroad Rate Regulation" by Professors Joseph Henry Beale Jr. and Bruce Wyman.[4] In these publications Professor Wyman argues most ingeniously that the original reason for classing certain callings as public or common callings and imposing peculiar liabilities upon them was that "in the public callings the situation is that of virtual monopoly"[5] and, therefore, the general law governing the dealings between individuals would not protect those dealing with persons engaged in such callings, in consequence of which more stringent rules of law were applied.[6] In the "His-

[1]Cases on Public Service Companies by Bruce Wyman, published by the Harv. L. Rev. Ass'n.

[2]Wyman on Public Service Corporations.

[3]17 Harv. L. Rev. 156-173; 217-247.

[4]Chap. I entitled "Historical Introduction."

[5]17 Harv. L. Rev. 161.

[6]Railroad Rate Regulation, Chap. I, particularly §§ 1, 12, 32.

torical Introduction" to his latest work on the subject of public service companies, Professor Wyman restates the same view.[7] A rather careful study of the subject has led me to a somewhat different conclusion.

The features which at early common law distinguished those engaged in public or common callings (the original public service companies)[8] from those who were not so engaged, were the peculiar general duties laid upon the persons engaged in common callings to serve all applicants for their services, and to perform such services with care without a special *assumpsit* to that effect. To these primary duties there are certain corollaries, namely, that the service must be reasonably adequate and rendered upon reasonable terms, and that it must be impartial.

The first question is, how did these primary duties arise? We should look for our answer to the early cases on this subject interpreted in the light of the conditions existing when this duty was first recognized, and to the views of the early law writers.

Suits against those engaged in public callings, for their refusals to serve or their failure to serve properly, seem first to have been brought after the introduction into English jurisprudence of the action on the case.[9] Let us see how it was that persons engaged in common callings became liable to actions on the case for refusal to serve and for failure to serve properly.

Professor Ames in his great article on "The History of Assumpsit"[10] has thrown much light on the nature of the action on the case. Originally when an individual voluntarily entered into dealings with another and damages ensued, through the latter's fault, there was in the conception of the early lawyers no tort—it was only when an *assumpsit* and a breach thereof were pleaded that an action on the case could at first be maintained under such circumstances.[11] It would seem that the origin and basis of the liability of the person engaged in a common calling for failure to serve, or for lack of care in the performance of the service, is to be found in this early developed branch of the action on the case. It was because a person held himself out to serve the public generally, making that his business, and in doing so assumed

[7] Wyman on Public Service Corporations, Chap. I.

[8] This term "Public Service Company" is not entirely satisfactory, but it is difficult to find a substitute which is not unwieldly.

[9] (1285) Statute 13 Ed. I, c. 24.

[10] 2 Harv. L. Rev. 1-19; 53-69; 377-380.

[11] 2 Harv. L. Rev. 3.

to serve all members of the public who should apply, and to serve them with care, that he was liable in an action on the case for refusal to serve or for lack of care in the performance of the service, by which refusal or lack of care he had committed a breach of his *assumpsit*. We must remember that, at the time when actions originated against those engaged in common callings, the action of *assumpsit* as we understand it, with consideration as a necessary element, had not come into being, but that that action was evolved at a later day from the earlier *action on the case* wherein the *assumpsit* and its breach were conceived of as the vital elements of the tort.

To explain briefly; if a man agreed to carry goods from one place to another, or agreed to give safe shelter to a person, or agreed to shoe a person's horse, or to make his suit, and performed the agreed services improperly he would be liable on the ground that he had broken his *assumpsit*, and on that ground alone. In the ordinary case it was necessary that there should have been an express special *assumpsit* to do the thing which it was claimed had been improperly done and that this *assumpsit* should be specifically pleaded. In actions against those engaged in common callings the allegation of an express special *assumpsit* is not found, and it was not necessary to a recovery that there should have been such *assumpsit*. At first glance this may seem to be evidence against the correctness of my contention, but I think a little consideration will dispel this impression. The fact that one was a common carrier, common innkeeper, common farrier, or common tailor was of itself a general *assumpsit* to serve carefully in carrying, shoeing, tailoring or giving shelter, and the allegation in such actions that the person charged was a common carrier, or common innkeeper, *etc.*, involved of necessity in the word "common" the implied allegation of an *assumpsit* to serve properly, and an allegation of a failure to so serve was a sufficient allegation of breach of this *assumpsit*, and it was therefore unnecessary to set forth these allegations of an *assumpsit* and its breach in express terms.[12]

[12]The pleading in an action in the early days against one in a common calling also frequently contained an allegation that the defendant was liable on the custom of the realm, but this had no more significance than an allegation that, having done or left undone the things set out, he had made himself liable by the common law. In Ansell *v.* Waterhouse (1817) 2 Chit. R. 1, Bayley, *J.*, said, "In all actions formerly against carriers, and that up till a very late time, it was usual to begin the declaration with an averment of the custom, and so in many other cases, as against inn-

However, it may be said that, granting the soundness of the argument just presented, we are as far as ever from an explanation of the origin of the duty of those engaged in "common callings" to serve all who apply for service. It may be suggested that there is a vital difference between an improper performance of a duty assumed and actually entered upon, and the refusal to perform a service which a person has engaged that he will perform. In support of this suggestion there would probably be cited *Coggs* v. *Bernard*[13] in which Gould, *J.*, says by way of *dictum,*

"But if a man undertakes to build a house without anything to be had for his pains, an action will not lie for non-performance, because it is *nudum pactum.*"

and *Elsee* v. *Gatward*[14] in which the question, passed upon in the *dictum* above, actually came up for determination, and the same conclusion was reached. But it is to be remembered that these decisions were rendered after an *assumpsit* had become established as the basis of contractual obligations, to which consideration was necessary, and when it was no longer recognized as the basis of tort liability without regard to consideration. Those cases, therefore, have no real significance in a discussion attempting to determine the origin of the duty to serve of one engaged in a common calling, which duty originated before the contractual *assumpsit,* which was under discussion in those cases, had been developed.[15] If we get back to a time before the contractual *assumpsit,* as we now understand it, had developed it is hard to see why, if an *assumpsit* to carry goods and its breach by loss of the goods would support an action on the case, a similar *assumpsit* and its breach by refusal to carry would not also support such an action.

But in fact it seems to me that the position of one who is engaged in a common calling and refuses to serve an applicant is quite distinguishable from that of the carpenter who promises to

keepers." In Pozzie *v.* Shipton (1838) 1 P. & D. 4, 14, it is said: "The practice appears to have been in former times, to set out the custom of the realm, but it was afterward very properly held to be unnecessary so to do, because the custom of the realm is the law, and the Court will take notice of it * * *."

[13](1703) 2 Ld. Raym. 909.

[14](1793) 5 D. & E. 143.

[15]It is interesting also to notice that in 1 Rolle's Abridgment 9, l. 41, although the law is stated in terms similar to those in the *dictum* in Coggs *v.* Bernard, still a conflict of decisions in the Year Books is recognized on this point.

build a house and does not do so. The former has in fact entered upon the general undertaking of a common calling while the carpenter has entered upon no undertaking, and when the former refuses to serve he is not really refusing to enter upon an undertaking as the carpenter is but is refusing to perform the public undertaking already entered upon. Looking at it in this way the liability of the common carrier (for instance) who refused to carry for an applicant is not to be distinguished, on principles of *assumpsit* and case, applied at the time when the liabilities of those engaged in common callings arose, from the liability of the same carrier who received the goods tendered and improperly carried them. And so, in an action for refusal to serve, the fact that the defendant was engaged in a common calling would supply the *assumpsit* to serve, and the allegation of the common calling and of the refusal to serve would constitute a sufficient allegation of the *assumpsit* and its breach, and the breach of the *assumpsit* to perform the public service which had been undertaken would be a sufficient basis for an action on the case.

The suggestion which I have made seems to coincide with the view taken by Blackstone, for he says:[16]

"There is also in law always an implied contract with a common innkeeper, to secure his guest's goods in his inn; with a common carrier or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common taylor, *or other workman*,[17] that he performs his business in a workmanlike manner; in which if they fail, an action on the case lies to recover damages for such breach of their *general* undertaking.[17] But if I employ a person to transact any of these concerns, *whose common profession and business*[17] it is not, the law implies no such *general* undertaking; but, in order to charge him with damages, a *special* agreement is required. Also, if an innkeeper, or other victualler, hangs out a sign and offers his house for travellers, it is an implied engagement to entertain all persons who travel that way; and upon this *universal*[17] *assumpsit* an action on the case will lie against him for damages, if he without good reason refuses to admit a traveller."

From this we see that a person, by holding himself out to serve the public generally, assumed two obligations—to serve all who applied; and, if he entered upon the performance of his service, to do it in a "workmanlike manner." The breach of either "gen-

[16] 3 Bl. Comm. 165.

[17] The italics are the present writer's.

eral undertaking" or "universal *assumpsit*" laid a person open to an action on the case, but in neither action were the *assumpsit* and its breach pleaded in terms, the allegation that the defendant was engaged in a common calling and had refused to serve or had neglected to serve properly, supplying by implication the place of the express allegation of the *assumpsit* and its breach found in other actions on the case.[18]

This explains the importance of the word "common" prefacing the title of a calling, and the importance of pleading in an action for refusal to serve, that the defendant was engaged in a "common calling." In *The Six Carpenters case*[19] it was said *arguendo* "the law gives authority to enter into a *common* inn or tavern." In an *Anonymous* case[20] the court said:

"An action on the case lyeth against an innkeeper who denies lodging to a travailer for his money, if he hath spare lodging; because he hath subjected himself to keep a common inn."

In *Mason* v. *Grafton*[21] it was expressly determined that it was necessary in an action on the case against an innkeeper to allege that he kept a common inn.

The same thing was true in other common callings. A case decided in the Common Pleas in 1441[22] is particularly instructive. An action on the case was brought against a surgeon for failure to cure a horse. Paston, *J.*, said:

"You have not shown that he is a common surgeon to cure such horses, and, therefore, although he has killed your horse by his medicines you shall have no action against him without an *assumpsit*."[23]

This was an action for failure to serve well, but if there was a duty on a "common" surgeon to serve well, a breach of which duty

[18]Mr. Justice Holmes in his book on the Common Law has this to say (p. 184): "If damage had been done or occasioned by the act or omission of the defendant in the pursuit of some of the more common callings, such as that of a farrier, it seems that the action could be maintained, without laying an assumpsit, on the allegation that he was a 'common' farrier. The latter principle was also wholly independent of bailment. It expressed the general obligation of those exercising a public or 'common' business to practice their art on demand, and show skill in it."

[19](1611) 8 Coke 146.

[20](1623) Wyman, Cases on Pub. Ser. Co. 127.

[21](1725) Hobart 245.

[22]Y. B. 19 H. 6, 49, pl. 5.

[23]In 10 Selden Society Publications, case 128, there is a brief report of an action brought on a special *assumpsit* to cure a broken arm, defendant having improperly set about the cure to plaintiff's great injury.

would lay the surgeon open to an action on the case without a special *assumpsit,* that was because of the general *assumpsit* of his holding out as a common surgeon, which general *assumpsit* would be sufficiently set out by alleging that he was a "common" surgeon. For the same reason a common surgeon would be liable for refusal to serve, and in an action on the case against him for such refusal, the allegation that he was a common surgeon would sufficiently set out his general *assumpsit.*

Another interesting case is that of *Jackson* v. *Rogers*[24] decided in the King's Bench in 1683. The following is the text of the report:

"Action sur le case, for that whereas the Defendant is a Common Carrier from London to Lymmington *et abinde retorsum,* and setting forth as the Custom of England, that he is bound to carry Goods, and that the Plaintiff brought him such a Pack, he refused to carry them, though offered his Hire; and held by Lord Jefferyes, that the Action is maintainable, as well as it is against an Inn-keeper for refusing Guests, or a Smith on the Road who refuses to shoe my Horse, being tendered Satisfaction for the same. Note, That it was alledged and proved that he had Convenience to carry the same; and that the Plaintiff had a Verdict."[25]

In *Lane* v. *Cotton,*[26] in discussing the liability of the postmaster general for property lost in the mails, Holt, *C. J.,* comparing the position of the postmaster general and the position of those engaged in common callings, used these significant words:[27]

"* * * wherever any Subject takes upon himself a Publick Trust for the Benefit of the rest of his fellow Subjects, he is *eo ipso* bound to serve the Subject in all the Things that are within the Reach and Comprehension of such an Office, under Pain of an Action against him; and for that see Kelway 50. If on the Road a Shoe fall off my Horse, and I come to a Smith to have

[24] 2 Shower 327.

[25] In Owen *v.* Lewyn (1672) 1 Vent. 223, we read: "The Plaintiff declared in an action upon the case, upon the custom of the realm against a common carrier, * * *." This apparently was an action based upon the general *assumpsit* of a common carrier to serve well, the allegation of which *assumpsit* is contained in the declaration that defendant was a "common carrier," a breach of which, by the "custom of the realm"—*i. e.* the common law—made him subject to this action on the case. See to the same effect Beedle *v.* Morris (1609) Cro. Jac. 224. In Rich *v.* Kneeland (1613) Cro. Jac. 330, an action on the case was brought against a common bargeman for loss of goods. Judgment for the plaintiff and upon writ of error "it was assigned, first, because this action lies not against the common bargeman without special promise.—But all the Justices and Barons held, that it well lies as against a common carrier upon the land."

[26] (1701) 12 Mod. 472; s. c. 1 Ld. Raym. 546.

[27] *Ibid.* 484, 485.

one put on, and the Smith refuse to do it, an Action will lie against him, because he has made Profession of a Trade which is for the Publick Good, and has thereby exposed and vested an interest of himself in all the King's Subjects that will employ him in the Way of his Trade. If an Inn-keeper refuse to entertain a Guest, when his House is not full, an Action will lie against him; and so against a Carrier, if his Horses be not loaded, and he refuse to take a Packet proper to be sent by a Carrier; and I have known such Actions maintained, tho' the Cases are not reported. * * *

"If the Inn be full, or the Carrier's Horses loaded, the Action would not lie for such Refusal; but one that has made Profession of a public Employment, is bound to the utmost Extent of that Employment to serve the Publick."

That is, the reason why one engaged in a common calling is bound to serve is that he has taken "upon himself a Publick Trust for the Benefit of the rest of his fellow Subjects," that he has "made Profession of a Trade that is for the Publick Good;" that he has "made Profession of a public Employment." This is another way of stating that he is liable on his general *assumpsit,* which took the place of the special *assumpsit* which was at first necessary to make others liable to an action on the case.[28]

There seems, however, to be more in the language used by Chief Justice Holt than a mere recognition of the *assumpsit* basis of the liability of those engaged in common callings. That language suggests another factor which seems to have had weight in the establishment of the liability of those engaged in common callings, namely, the supposed similarity between the position of those who take upon themselves public offices and those who assume common callings. This same idea is voiced by Holroyd, *J.*, in *Ansell* v. *Waterhouse,*[29] when he says of an action against a common carrier:

"This is an action against a person, who, by ancient law, held as it were a public office, and was bound to the public."

Of course one who assumed a public office was bound to perform the duties of such office, and to perform them properly. For failure to do so such officer would not only make himself

[28]Bacon's Abridgment, tit. Inns and Innkeepers, C. 1: "For, he, who takes upon himself a public employment, must serve the public as far as employment goes, * * *." See also Buller's Nisi Prius, pp. 69-73; Story on Bailments (9th ed.) § 508; Hargrave and Butler's note 76 on Coke Litt, 89a; 1 Saunders 312c, note 2; 2 Jeremy on Carriers 5.

[29]*Supra.*

liable civilly[30] but also criminally.[31] It was the result of the supposed similarity which led the court in *Rex* v. *Ivens*[32] to hold that the keeper of a common inn was criminally liable for refusal to entertain a traveller.

So it seems safe to believe that originally anyone who held himself out to serve all who might apply was conceived of as assuming a public or common calling, and by force of this *assumpsit* was held to obligate himself to serve all who should apply and to serve with care. In a state of society so primitive as that of the time of which we are speaking, the kinds of things which a person would be likely to hold himself out to do for all applicants would be few, perhaps not much more numerous than those of which we have a record in the early cases—namely, the common innkeeper and victualler,[33] the common carrier,[34] the common ferryman,[35] the common bargeman, hoyman or other common water carrier,[36] the common farrier,[37] the common tailor,[38] and the common surgeon.[39] However, as a result of the rapidly changing economic conditions it soon became more and more usual for persons to hold themselves out to serve the public generally in all lines of commercial activity, so that such a holding-out lost any distinctive significance which it earlier had; and as a result of the rapid development of legal science and the clarification of legal ideas, breach of legally-imposed rather than self-imposed duty came to be conceived of as the basis of tort liability, and the *assumpsit,* so important in earlier actions on the case, and implied in the case of one engaged in a common calling from the holding-out, was no longer recognized as a necessary element. What

[30]Palmer *v.* Porter (1595) Moore 431.

[31]For early instances of the recognition of such liabilities see 24 Selden Society Publications (6 & 7 E. 2, 1313-1314) 82-89, where a bailiff was held subject to *amercement* for failure to execute a condemned criminal, and a coroner was held similarly liable for failure to view the body of one dying suddenly.

[32](1835) 7 C. & P. 213, where the court said that "innkeepers are a kind of public servant."

[33]Cases already cited, and (1410) Y. B. 11 H. 4, 45, pl. 8; (1444) Y. B. 22 H. 6, 21, fol. 38; (1460) Y. B. 39 H. 6, 18, pl. 24.

[34]Cases already cited, and Bastard *v.* Bastard (1679) 2 Shower 81; Bosan *v.* Sandford (1687) 1 Shower 29.

[35]Elsee *v.* Gatward *supra;* 1 Saunders 312c, note 2.

[36]Rich *v.* Kneeland *supra;* Nichols *v.* More (1670) 1 Sid. 36; Morse *v.* Slue (1673) 1 Vent. 238.

[37]Note (1502) Keilway 50; Lane *v.* Cotton *supra.*

[38](1483) Y. B. 22 E. 4, 49, pl. 15

[39](1441) Y. B. 19 H. 6, 49, pl. 5.

effect had this upon the liabilities of those engaged in "common callings?" In the first place the liability for injury resulting from failure to properly perform the service after it was entered upon was now, broadly speaking, based upon the duty arising from the custody of the goods, instead of upon the *assumpsit*. But with regard to the liability for refusal to serve, the situation was different. A person no longer became liable to an action on the case simply because he held himself out to serve the public generally and then refused to serve some member of the public who applied—this obligation now attached only to common carriers by land and water (including ferrymen) and innkeepers. The liability of the common surgeon, the common tailor, the common farrier, etc., was no longer recognized under such circumstances.[40] Perhaps several reasons may be hazarded for the survival of this peculiar liability of the carrier and innkeeper, even when the reasons in which it originated would no longer be recognized as sufficient basis for a tort action. An obvious reason is that such liability had been repeatedly imposed upon those classes, and so their liability for refusal to serve had become a familiar doctrine; as so often happens, the rule came to be stated constantly without the original reasons for it, and so the reasons were gradually forgotten. Perhaps a factor in the survival of this liability in the cases of common carriers and innkeepers was the fact that, on account of their importance, the analogy between them and public officers seemed most apparent.[41] And undoubtedly the indefinable but frequently encountered principle of public policy played no little part in the survival of this liability, for such liability, as applied to common carriers of all classes and to innkeepers was particularly advantageous to the ever growing numbers of merchants and travellers, whom the law increasingly tended to favor, and with whom carriers and innkeepers dealt primarily.[42] Thus

[40]Mr. Justice Holmes in his Common Law (p. 203) after quoting from Lane *v.* Cotton *supra*, to the effect that "If a man takes upon himself a public employment, he is bound to serve the public as far as the employment extends, and for refusal an action lies" says: "An attempt to apply this doctrine generally at the present day would be thought monstrous. But it formed part of a consistent scheme for holding those who followed useful callings up to the mark. * * * The scheme has given way to more liberal notions; but the *disjecta membra* still move."

[41]For instance in Jeremy on Carriers p. 59, it is said of a common carrier that he is "to be considered in the light of a public servant, and as such liable to an action for refusing to take charge of the goods."

[42]This point of view is well indicated by the language used in Bonner *v.* Welborn (1849) 7 Ga. 296, 307, as follows: "It is because inns and innkeepers have to do with the travelling public—strangers—and that for

survived the common law duty of common carriers and innkeepers to serve, according to their holding-out, those who might apply, though the original reason for the imposition of the duty, no longer sufficient in itself to justify its imposition, was forgotten, and new reasons had to be found for its justification.

It seems logical at this point to see just what persons are affected by this peculiarly surviving duty to serve all who apply for service. It has been said that the duty no longer appears to attach to those originally recognized as engaged in common callings, except the common carrier, including the ferryman and the innkeeper. But what do those terms include?

It is not easy to define an innkeeper in such a way as to furnish a satisfactory guide in all situations. Generally speaking, however, an innkeeper is one who holds himself out to supply all travellers with food and lodging.[43] In *Fay* v. *Pacific Improvement Co.*[44] the court said:

"The fact that the house is open for the public, that those who patronise it come to it upon the invitation which is extended to the general public, and without any previous agreement for accommodation or agreement as to the duration of their stay, marks the important distinction between a hotel or inn, and a boarding-house."[45]

In *Gisbourn* v. *Hurst*[46] it was resolved,

"That any Man undertaking for Hire to carry the Goods of all Persons indifferently, as in this Case, is, as to this Privilege, a common Carrier."

This is perhaps as satisfactory a general definition as can be found, and has been continually quoted and cited with approval. And, although the wording is very inclusive, the definition in this

brief periods, and under circumstances which render it impossible for each customer to contract for the terms of his entertainment, that the law has taken them so strictly in charge." And see two early North Carolina cases: Anon. *v.* Jackson (1792) 1 Haywood 14; Harrell *v.* Owens (1835) 1 Dev. & Bat. 273.

[43]See Beale on Innkeepers and Hotels, Chap. II.

[44](1892) 93 Cal. 253, 259.

[45]In Schouler on Bailments 253, the difference is stated in this way: "An inn is a house where a keeper holds himself out as ready to receive all who may choose to resort thither and pay an adequate price for the entertainment; while the keeper of a boarding-house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode."

[46](1710) 1 Salk. 249.

respect is borne out by the authorities. Story says that common carriers by land are

"the proprietors of stage-wagons, stage-coaches, and railroad cars. * * * So are truckmen, wagoners, teamsters, carmen, and porters, who undertake to carry goods for hire, as a common employment, from one town to another, or from one part of a town or city to another."[47]

In *Brind* v. *Dale*[48] Lord Abinger expressed the opinion that a town carmen who plied near the wharf without fixed *termini* was not a common carrier. This, however, is not now the law of England,[49] and in this country, baggage transfer companies,[50] cartmen and the like,[51] and proprietors of public hacks and cabs[52] have repeatedly been held to be common carriers. Similarly,

"Hoymen, bargemen, lightermen, and, in short, boatmen of every discription upon rivers, canals, lakes or the sea, come within the denomination of common carriers if they engage in the business of carrying or transporting goods indifferently for all who may employ them."[53]

Of course street railways are common carriers of passengers,[54] and they may, by the nature of their holding-out, become common carriers of goods.[55] Although express companies are of comparatively recent origin there is no question that they are also common carriers,[56] and this fact was recognized by the Supreme Court of the United States, in *The Express Cases*,[57] where Mr. Chief Justice Waite says:

"But it is neither averred in the bills, nor shown by the testimony, that any railroad company in the United States has ever held itself out as a common carrier of express companies, that is to say, as a common carrier of common carriers."

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[47]Story on Bailments (9th ed.) § 496, supporting the text with numerous citations.

[48](1837) 8 C. & P. 207.

[49]Liver Alkali Co. *v.* Johnson (1874) L. R. 9 Exch. 338.

[50]Note, 34 L. R. A. 137.

[51]Note, 21 L. R. A. (N. S.) 188.

[52]Note, 5 L. R. A. (N. S.) 1069.

[53]Hutchinson on Carriers § 65.

[54]Citizens Ry. Co. *v.* Twiname (1887) 111 Ind. 587; Spellman *v.* Transit Co. (1893) 36 Neb. 890.

[55]Levi *v.* Railroad Co. (Mass. 1865) 11 Allen 300.

[56]Buckland *v.* Adams Exp. Co. (1867) 97 Mass. 124; Belger *v.* Dinsmore (1872) 51 N. Y. 166.

[57](1886) 117 U. S. 1, 21.

But with the development of railroad carriage, there has entered a new species, namely the sleeping and parlor car company. It has been determined by many courts that such a company is not an innkeeper,[58] nor a common carrier,[59] but because it partakes to a considerable extent of the character of an innkeeper, and particularly because, although not a carrier, its services have become a so usual and almost necessary complement of the carrier's ordinary services, it has by analogy been classed with innkeepers and common carriers, and is bound to serve impartially all applicants who have complied with the regulations of the carrier. Perhaps the language used in the Mississippi case of *Pulman Palace-Car Co.* v. *Lawrence*[60] sets forth the general view as well as that in any case. The court says:[61]

"We now proceed to consider the law of the liability of the appellant in the present case. We need hardly say that the law of the state of Illinois is that to which we must look to ascertain whether a cause of action is shown, and to determine the extent and measure of the recovery sought, if appellee was entitled to recover at all. * * * It must be conceded, further, that the Pullman Palace-Car Company is not technically a common carrier in the state of Illinois. Our constitution has wisely declared all sleeping-car companies common carriers, but such is not the law in Illinois. In Illinois, as in many other states, sleeping-car companies are regarded as nondescript corporations—sui generis. By these authorities they are said to be neither common carriers nor innkeepers. And yet they bear some marked resemblance to both. They are under the duty of not only furnishing seats in their cars to all proper persons applying therefor, but they are also under the obligation in all proper cases, and to the extent of their ability and capacity, to furnish sleeping accommodations and food to the travelling public, for proper compensation. They therefore seem to possess some of the characteristics of innkeepers. And they seem to be quasi common carriers. They own and use railway cars affording many comforts, conveniences and luxuries unknown to first-class ordinary cars of railroad companies, and these cars are to be used in the transportation of passengers from point to point, and the general travelling public is invited to become patrons of the company owning and using these luxurious coaches. The company is, in some sense, engaged in transportation, and its business is with the general public. It is unlike the private carrier, who may select his own customers, for it must take all who are proper persons, and who pay the demanded fare. So, though not

[58]Beale on Innkeepers and Hotels § 341.
[59]*Id.* § 342.
[60](Miss. 1897) 22 So. 53.
[61]*Ibid.* 57.

technically a common carrier in Illinois, it bears marked resemblance to the common carrier, and must be held to the performance of its appropriate duties in its business intercourse with the travelling public."[62]

It is necessary now to speak briefly of the origin of what I have termed the corollary duties. Probably the duty to serve for reasonable compensation did not originate as a peculiar duty of those engaged in common callings. It was the early policy in England to require the performance of all kinds of services for reasonable compensation. There were numerous early parliamentary statutes fixing the prices of different goods and services or requiring that such prices should be reasonable.[63] It is probable that the duty to serve for an accustomed price was also enforced by the courts. The Eyre Rolls of 6 & 7 Ed. II[64] show an action against certain men who had been accustomed to carry passengers between Gravesend and London and *vice versa* for a fare of a halfpenny, but who then were charging each passenger a penny for the same journey. They were "forbidden for the future to take from any man anything more than a halfpenny."[65] Furthermore there was undoubtedly a vast amount of local regulation of the price of goods and services by gilds and municipalities. The following is an interesting early example of this character of regulation:

"Order of porters and Creelmen.

"Also it is ordered by the keepers of the town of Beverley in the Gild Hall of Beverley, at an assembly of the whole community, S. Wilfrid's day A. D. 1367, and to this all the porters and creelmen of Beverley who then commonly exercised that right in Beverley consented, that each of them should take for the load or baggage of one horse from the Beck to the Minster and Eastgate 1/2d.; from the Beck to Cross Bridge 3/4d.; and beyond Cross Bridge to North Bar 1d.; to Lairgate 1d., and to Keldgate 3/4d."[66]

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[62]See also Nevin *v.* Pullman Palace Car Co. (1883) 106 Ill. 222; Pullman Palace-Car Co. *v.* Booth (Tex. 1894) 28 S. W. 719; Searles *v.* Mann Boudoir Car Co. (1891) 45 Fed. 330; Lemon *v.* Pullman Palace Car Co. (1887) 52 Fed. 262.

[63]Wyman on Public Service Corporations § 17; and see 1 Selden Society Publications 18, 33, 89; 4 *id.* 23, 25; 5 *id.* 32-50, 51, for early actions for breach of such regulations.

[64]24 Selden Society Publications xc.

[65]And see Gamble *v.* Andrew (1551) 11 Selden Society Publications 18.

[66]14 Selden Society Publications (Beverley Town Documents) 21.

And among the same documents we find one giving the price of beer which goes on to provide that

"if any one offer 1 1/2d for a gallon of beer anywhere in Beverley and the ale wife will not take it, that the purchaser comes to the Gild Hall and complain of the brewster, and a remedy shall be found."[67]

This period of universal regulation passed away, but by the time it had done so, the duty of the survivors of the class of persons engaged in common callings to serve all applicants had lost its *assumpsit* character, and had come to rest upon an arbitrary public duty justified on the grounds of public necessity—that is when it was justified at all—and was not allowed to rest upon a merely historical basis. But it is clear that the duty would be of very little value to the public if the persons upon whom the duty rested might make any charge which they chose to make for their services, and so the arguments of public necessity which now justify this duty require, as a corollary to it, the continued imposition of the duty to serve for a reasonable price, which is no longer imposed upon persons engaged in private businesses.[68] That this duty now exists upon the survivors of the class of persons engaged in common callings is a proposition so undoubted that authority hardly needs to be cited in its support. As was said by Lawrence, *J.*, in *Harris* v. *Packwood*,[69]

"a carrier is liable by law to carry everything which is brought to him, for a reasonable sum to be paid for the same carriage; and not to extort what he will."[70]

The duty to furnish adequate facilities is a duty of comparatively recent development. We do not meet with it in the early reports, as, on the other hand, we do not meet with what appears to be a generally accepted doctrine, that one engaged in a common calling is not liable for refusal to serve if his existing

[67] *Id.* 41.

[68] As is said by Professor Beale in his valuable work on Innkeepers and Hotels § 57: "Another rule clearly following from the general principle that the innkeeper must receive all travellers as his guests is that he is limited to a reasonable compensation for his services; for if he could charge what he pleased, he could make anyone's right to be received valueless by requiring the payment by way of accommodation of a prohibited amount."

[69] (1810) 3 Taunt. 264, 272.

[70] See also Riley *v.* Horne (1828) 5 Bing. 217, 224; Hollister *v.* Nowlen (1838) 19 Wend. 234; 2 Kent's Comm. 599; Story on Bailments §§ 475, 508; Angell on Carriers §§ 67, 124, 356; Hutchinson on Carriers 804; Beale on Innkeepers and Hotels § 57; Interstate Commerce Act § 1.

facilities are exhausted. This is the effect of the note to *Jackson* v. *Rogers*[71] printed above where it is said that "it was alledged and proved that he [the defendant] had Convenience to carry the same; * * *." And as we have already seen, Lord Holt said in *Lane* v. *Cotton*:[72]

"If an Inn-keeper refuse to entertain a Guest, where his House is not full, an Action will lie against him; and so against a Carrier if his Horses be not loaded, and he refuse to take a Packet proper to be sent by a Carrier; * * *."

So it was said in *Anonymous* case:[73] "An action on the case * * * against an innkeeper who denies lodging to a travailer for his money, if he hath spare lodging * * *." In Bacon's Abridgment[74] the author has this to say of carriers:

"Also, if a common Carrier, who is offered his Hire, and who has Convenience, refuses to carry Goods, he is liable to an Action, in the same Manner as an Inn-keeper who refuses to entertain a Guest, or a Smith who refuses to shoe a Horse."[75]

Again in the development of this duty reasons of public necessity and the modern conception of the public service company as a quasi-public agency probably play no little part. That this duty has of late years been imposed upon those engaged in many different semi-public undertakings is undoubted,[76] but it is not a duty universally imposed on those engaged in the so-called public callings of to-day.[77] As we shall see later, this duty probably owes its origin principally to the public franchises granted to the vast majority of modern public service companies, and has its logical basis in such grants.

The doctrine that patrons of public service companies are entitled to similar rates for substantially similar services is probably not to be found in any except recent cases. Until late years it was not suggested that a man had any ground for complaint if a public service company charged him a rate reasonable *per se*,

[71] *Supra.*

[72] *Supra.*

[73] *Supra.*

[74] Tit. Carriers, B.

[75] See also White's case (1693) 2 Dyer 158b; Buller's Nisi Prius 70; Jeremy on Carriers 59; Jones on Bailments 94.

[76] For an interesting collection of cases on this particular subject see Wyman's cases on Public Service Companies, Chap. V.

[77] It has not been imposed upon innkeepers, Browne *v.* Brandt [1902] 1 K. B. 696, and the Delaware Court seemingly refuses to impose it upon a cartman. Tunnel *v.* Pettijohn (1835) 2 Harr. 48.

though another patron were charged less for similar service. And when such a suggestion was made courts took different views as to what the common law was on the subject.[78] Mr. Justice Brown, speaking for the Supreme Court of the United States, has said:[79]

"Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24 Stat. 379, C. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service; * * * [citing authorities]; though the weight of authority in this country was in favor of an equality of charge to all persons for similar services."

It seems to be the growing tendency to require public service companies to charge the same rates for substantially similar services, and perhaps the reasons for imposing the duty are nowhere better set forth than in *Messenger* v. *Pennsylvania Railroad Co.*[80] The court first justifies the imposition of the duty on the ground that the common carrier is conceded to be a quasi-public agent, and

"a person having a public duty to discharge, is undoubtedly bound to exercise such office for the equal benefit of all, and therefore to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community."

But the court says that if this is not so there is still another ground for imposing the duty not to discriminate. To quote a few sentences:

"A company of this kind is invested with important prerogative franchises among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. * * * If they had remained under the control of the state, it could not be pretended, that in the exercise of them, it would have been legitimate to favor one citizen at the expense of another. * * * And it seems to me impossible to concede,

[78]Fitchburg R. R. *v.* Gage (Mass. 1859) 12 Gray 393; Messenger *v.* Penn. R. R. Co. (1874) 37 N. J. L. 531; Baxendale *v.* Easton Ry. Co. (1858) 4 C. B. (N. S.) 63.

[79]Interstate Com. Commiss. *v.* B. & O. Railroad (1892) 145 U. S. 263, 275.

[80]The opinion of the Supreme Court (1873) 36 N. J. L. 407, 410.

that when such rights as these are handed over, on public considerations, to a company of individuals, such rights lose their essential characteristics. * * * In the use of such franchises all citizens have an equal interest and equal rights, and all must, under the same circumstances, be treated alike."[81]

A person may not only discriminate in the matter of prices charged, but in the order of service. But it seems never to have been doubted that the latter kind of discrimination was unlawful.[82] It would naturally be an implied term of the *assumpsit* to serve all applicants, that they should be served in the order of application, and there seems also to have been some early regulations to the same effect.[83] Of course this kind of discrimination is as obnoxious to the modern conception of the public service company's duty as discrimination in prices.

(TO BE CONCLUDED.)

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[81] *Ibid.* 413.

[82] See the language already quoted from Interstate Com. Commiss. *v.* B. & O. Railroad *supra.*

[83] See 14 Selden Society Publications (Beverley Town Documents) 57:

"Of porters and creelers.

"Also, it was ordered [1467] that if any carrier, porter or creeler of the aforesaid town shall be ordered, or have notice given him, by any burgess of the aforesaid town to carry merchandise or other things and goods of any kind belonging to the same burgess, he shall serve the same burgess first in such carrying, unless he shall have been before employed in carrying for another burgess of the aforesaid town, and then, after finishing his carrying for the first burgess he shall carry for the second, and not depart from carrying until he has finished all the carriage for the same burgess; and if he presume to do so he shall pay 6s. 8d. to the community aforesaid, as often as this shall be established with reasonable certainty before the governors in the Gild Hall."